The United States Constitution

1. Article I – Legislative Branch

2. Article II – President

3. Article III – Judiciary

4. Article III
   a. § 1 – Judicial Power of US
      i. Establishes the one supreme court
      ii. Allows congress to create inferior courts
      iii. Judges have life tenure
   b. § 2 – Jurisdiction
      i. Clause 1 – Judicial power extends to cases in law and equity
         1. Arising under Constitution, laws, or treaties of US
         2. Of admiralty and maritime jurisdiction
         3. In which the US is a party
         4. Between two or more states
         5. Between a state and citizens of another state
            a. But see 11th Amendment
         6. Between citizens of different states
         7. Between citizens of the same state claiming lands under grants of
            different states, and
         8. Between a state or citizens thereof and foreign states citizens, or
            subjects
      ii. Clause 2 – Original Jurisdiction
         1. Cases affecting Ambassadors and other public ministers and
            consuls
         2. United States is a party
      iii. Clause 3 – Trial of crimes except impeachment by jury
   c. § 3 – Treason Against United States (Congress’ power: declare punishment)
      i. Consisting in levying War against hem
      ii. Adhering to enemies
      iii. Giving enemies aid or comfort
         1. Note: limits scope of treason

5. Article IV
   a. § 1 – Full Faith and Credit
   b. § 2 – Privileges and Immunities
   c. § 3 – New states admitted by Congress
   d. § 4 – Guarantee Clause
      i. Guarantee Republican form of government
6. **Article V – Amendments**  
   a. 2/3 of House and 2/3 of Senate

7. **Article VI**

   a. **Clause 2 – Supremacy Clause**  
      i. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
The Judicial Power: Generally

1. Article III

a. § 1 – Judicial Power of US
   i. Establishes **one** supreme court
   ii. Allows congress to create inferior courts
   iii. Independence: Judges life tenure

b. § 2 – Jurisdiction “Cases & Controversies”
   i. Clause 1 – Judicial power extends to cases in law and equity
      1. Arising under Constitution, laws, or treaties of US
      2. Of admiralty and maritime jurisdiction
      3. In which the US is a party
      4. Between two or more states
      5. Between a state and citizens of another state
         a. BUT: 11th Amendment - Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
      6. Between citizens of different states
      7. Between citizens of the same stat claiming lands under grants of different states, and
      8. Between a state or citizens thereof and foreign state,s citizens, or subjects
   ii. Note: Congress has power to create exceptions and regulations to appellate jurisdiction

iii. Clause 2 – Jurisdiction
   1. Original Jurisdiction
      a. Cases affecting Ambassadors and other public ministers and consuls
      b. United States is a party
   2. Appellate jurisdiction
      a. In all other cases before mentioned
      b. Both as to law and fact

iv. Clause 3 – Trial of crimes except impeachment by jury

c. § 3 – Treason Against United States (Congress’ power: declare punishment)
   i. Consisting in levying War against hem
   ii. Adhering to enemies
   iii. Giving enemies aid or comfort
      1. Note: limits scope of treason
The Judicial Power: Judicial Review

Article III does not grant federal courts power to review constitutionality of federal or state laws or executive actions

<table>
<thead>
<tr>
<th>Evolution of Judicial Review</th>
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<tbody>
<tr>
<td>Declare federal act unconstitutional</td>
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<tr>
<td>Review state court judgments on federal ?s</td>
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<tr>
<td>Declare state act unconstitutional</td>
</tr>
<tr>
<td>Review constitutionality of state laws and actions of state officials → rulings apply everywhere</td>
</tr>
<tr>
<td>Congress cannot make any law to overturn interpretation by the Supreme Court because it is a constitutional rule handed down by the court</td>
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</table>

   i. Right to commission he demands?
      1. Yes because all appropriate procedures were followed
   ii. If so do the laws of the country afford him a remedy? Could the court give remedy against executive branch?
      1. Yes: no person, not even president is above the law
      2. Has right to the commission – refusal to deliver is violation of that right for which he has a remedy
      3. Judiciary could provide remedies against executive when there is a specific duty to particular person
         a. But not when it is a political matter left to executive discretion
   iii. If so can the Supreme Court issue this remedy (a mandamus)?
      1. Depends: act repugnant to the Constitution is void (A-VI)
   iv. Court could not constitutionally hear case as matter of original jurisdiction
      1. Although Judiciary Act of 1789 authorized jurisdiction, provision of statute was unconstitutional because Congress cannot allow original jurisdiction beyond the situations enumerated in the constitution
      2. It is province and duty of judicial department to say what the law is
         a. So if a law is in opposition to the Constitution, the court must determine which conflicting rules governs case
v. § 13 of Judiciary Act authorized mandamus on original Jurisdiction
   1. BUT pursuant to Article III, Congress could not expand
      a. Article III enumeration of original JC would be mere
         surplusage without meaning if Congress could add more areas
         of original JX

vi. Article III is ceiling of federal jurisdiction – so that provision of Judiciary Act
    was unconstitutional

vii. Judicial Review is appropriate because Article VI makes Constitution the
     Supreme Law of the land
     1. Take oath of office – enforcing unconstitutional laws violates oath
     2. Constitution itself is first mentioned
        a. Not laws of US generally but those made pursuant to
           constitution have rank

viii. Declared provision of Judiciary Act 1789 unconstitutional
     1. Constitution imposes limits on government powers – meaningless
        without judicial enforcement
     2. Powers of legislature defined and limited
     3. Inherent to judicial role to decide constitutionality of laws
     4. Cases arising – implied power to declare unconstitutional laws

b. *Martin v. Hunter's Lessee* – authority to review judgment of state courts regarding
   federal law
   i. Judges of state courts are and always will be of as much learning, integrity,
      and wisdom as those of courts of US, the Constitution is based on recognition
      that state attachments, prejudices, jealousies and interests might sometimes
      obstruct or control or be supposed to obstruct or control the administration of
      justice

c. *Cohen v. Virginia* – authority to review state court judgments
   i. Reaffirmed § 25 of Judiciary Act and authority of SCOTUSS to review state
      court judgments
   ii. State courts often could not be trusted to adequately protect federal rights
       because many state judges are dependent for office and salary on will of
       legislature

d. *Cooper v. Aaron* – authority to review constitutionality of state laws and actions of
   state officials
   i. Article VI makes Constitution the supreme law of the land
   ii. Federal judiciary is supreme in exposition of law of Constitution and every
       state officer is solemnly committed by oat to support Constitution – courts
       decide what the law means and everyone is bound to adhere to decisions
       handed down by court

e. *Dickerson v. United States* - Congress cannot make any law to overturn
   interpretation by the Supreme Court because it is a constitutional rule handed down
   by the court
1. Political Restraints  
   a. Constitutional Amendment  
      i. Article V  
   b. Judicial Selection/Appointment  
      i. Article II § 2 Clause 2  
   c. Impeachment  
      i. Article II § 4  
   d. Court Packing  
      i. Article II § 2  
   e. Court Stripping  
      i. Article II § 2  
      ii. *Ex Parte McCordle* - no JX to rule on cases not derived from acts of Congress (Congress full power to regulate and limit appellate JX)  
         1. Locked up under Reconstruction Act and files for writ of *habeas corpus*. Congress repealed the act of 1867 that gave the SCOTUS jx to hear the case. Congress didn’t want the Reconstruction Acts to be found unconstitutional.  
            a. **Rule of Decision:** Court not at liberty to inquire into the motives of the legislature [at the same time, congress can’t dictate to the court how to find in a pending case]  
            b. **Dictating what precedent can be looked at** raises concerns  
               i. Is it ok to regulate the JX of the federal courts?  
                  Yes  
         iii. Does it violate the rule of proscribing the decision? No  

2. Constitutional Limits on Adjudication  
   a. Advisory Opinion Prohibition  
   b. Standing  
   c. Ripeness  
   d. Mootness  

3. Advisory Opinion Prohibition  
   a. Article III bars rendition of advisory opinions  
   b. Federal courts will not render decisions in:  
      i. Moot cases  
      ii. Collusive suits  
      iii. Cases involving challenges to governmental legislation or policy whose enforcement is neither actual nor threatened  
   c. Avoid provision  
      i. Actual dispute between adverse litigants  
   d. Declaratory Judgments → use this instead  
      i. Can hear actions for declaratory relief if case or controversy  
      ii. Actual dispute between parties having adverse interest
4. Standing
   a. Constitutional (Lujan v. Defenders of Wildlife)
      i. Personal Injury – in fact
         1. Concrete and particularized (Sierra Club = walk through park)
         2. Actual or imminent (Lujan = intent to return to Egypt to see wildlife does not support imminent injury…should have bought a plane ticket!)(Lyons = can’t show likelihood that you will be choked by cops again, so can only sue for injuries and not injunction
            a. Usually economic but not necessary
            b. Injured by government action
            c. Government made clear threat to cause injury if don’t comply with law, regulation or order
            d. Must be more than merely theoretical injury that all persons suffer by seeing their government engage in unconstitutional actions
            e. Re: injunction – substantial likelihood that he will be subject in future to allegedly illegal policy
      ii. Causation – between injury and conduct complained of
            a. Fairly traceable to challenged action AND
               i. Ex: third party not before court
            b. Not result of independent action
      iii. Redressability – (Massachusetts v. EPA)
            a. Would ruling favorable to litigant eliminate harm to him?
            b. Some possibility that requested relief will prompt injury-causing party to reconsider decision that allegedly harmed litigant

b. Prudential – Self-imposed limits
   Constitution permits adjudication, but decided that certain instances are better left undecided by judiciary decided certain instances
   i. No assertion of third party standing
      1. Exceptions
         a. If interests are so closely aligned (Massachusetts = state can represent interest of its residents) (Craig = beer seller can challenge gender differentiated drinking age even though he can buy beer himself)
         b. Greater unavoidable hindrance to right-holder’s own assertion of rights
         c. Substantial obstacles to third party asserting own right
            i. Reason to believe advocate will represent
               1. Third party unlikely to assert own rights
d. **Overbreadth** – may challenge statute on grounds that it violates rights of third parties not before the court even though law is constitutional as applied to that Δ
e. Standing for associations
f. Legally recognized “next friend”
g. *Qui tamsuit*
h. Establishment Clause challenge to government spending

### ii. Adjudication of generalized grievances

1. Sue solely as citizens concerned with having government follow law or as tax payers interested in restraining allegedly illegal government expenditures
   a. Exception: *Flast v. Cohen* – must be cause of action brought form specific religious based congressional appropriation
   b. Tax payer can challenge establishment clause
      i. Express congressional mandate AND
      ii. Specific congressional appropriation

2. *Hein* - Neither was there standing to challenge expenditures of executive branch general funds that allegedly violated the Establishment Clause

### iii. Zone of Interest

1. π must be within zone of interests protected by statute
2. When statute creates cause of action π or interested party sought to be vindicated must be within zone of interests protected or regulated by statute

### 5. Ripeness (Before claims developed)

a. Immediate threat of harm
b. Review only where
   i. II harmed
   ii. Immediate threat of harm

### 6. Mootness (After claims developed)

a. Real life controversy must exist at all stages of review
   i. Not merely when complaint filed
b. **Exception**
   i. Capable of repetition but evading review
      1. Where reasonable expectation that same complaining party will be subjected to same action again AND
      2. Would be again unable to resolve issue because short duration of action
7. **Political Question**
   a. Questions in their nature, political, or which are by the constitution and laws subutted to the executive can never be made in court

   b. Questions to ask (*Baker*):
      i. Is it textually committed to discretion of a branch other than judiciary? (*Powell* = House refused to sit Powell for financial impropriety because of the Art. I § 5 Qualifications Clause, but these qualifications are limited to those enumerated so judicial review and Congress must seat him. QS is whether C has the power, not how power should be exercised)
      ii. Is there a **judicially manageable standard** (is the court competent to decide political considerations)? (*Nixon* = no review for judicial impeachment b/c important check)
      iii. Will breed disrespect for the court or show its impotence?
      iv. Will show disrespect for co-equal branches? (*Goldwater* = treaty disputes are btwn co-equal branches who can protect themselves through political process. **Judiciary not mediator!**)
      v. Is there potential for embarrassing the nation (foreign policy = political b/c need finality)

<table>
<thead>
<tr>
<th>• Issues committed by Constitution to another branch of government (<em>Goldwater</em>)</th>
<th>• Inherently incapable of resolution and enforcement by judicial process</th>
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</thead>
</table>
| • Amendment Process  
  o *Coleman v. Miller* – reasonable time for ratification nonjusticiable → Court shouldn’t superintend only constitutional procedure that allows for overrule of its own decision) | • Congressional Qualifications  
  o *Powell v. McCormack* – highlight: allow people to pick their reps / Article I § 5 – textually demonstrable commitment to Congress to judge only qualifications expressly set forth in Constitution |
| • Impeachment Proceedings  
  o *Nixon v. United States* – Senate has sole authority to determine whether individual should be acquitted or convicted) | • Republican Form of Government  
  o *Luther* - PQ where state’s government declared unconstitutional, then all acts would be invalidated |
| • Turns on = language of the Guaranty Clause (Article IV § 4) | • Textually demonstrable commitment of issue to coordinate political department |
| • Foreign Relations | • Validity Relations |
| • Validity of Enactments | • Impossibility of deciding w/o initial policy determination not for judicial discretion |
Legislative Powers

1. Enumerated and Implied Powers
   a. Article I § 8
      i. All enumerated powers PLUS
      ii. Necessary and Proper Clause – power to make all laws necessary and proper for carrying into execution any power granted to any branch of the federal government

1. *McCulloch v. Maryland* – defines scope of federal legislative power and relationship to state authority
   a. Issue – Does Congress have authority to create Bank of US (YES) and is state tax on bank constitutional (NO)
   b. Holding
      i. Congress had authority to create bank in light of historical practice – history of US Bank as authority for constitutionality of second bank
      ii. Compact Federalism – States do not retain ultimate sovereignty because they ratified Constitution
         1. States as sovereign because they created US by ceding some power and by ratifying Constitution
      iii. Scope of Congressional authority – Congress not limited only to enumerate powers
         1. May choose any means not prohibited to carry out lawful authority
      iv. Meaning of N&P Clause – may choose any means not prohibited to carry out its express authority
         1. But not limitless

2. *US Term Limits v. Thorton* – Constitution prohibits states from adopting Congressional qualifications in addition to those enumerated by Constitution
   a. States have no reserved powers over composition or operation of federal government because powers may not be reserved for what does not yet exist
Legislative Powers: Commerce Clause

1. Internal Constraints
   a. Can currently regulate 3 broad categories (Lopez):
      i. Channels of interstate commerce, like highways
      ii. Instrumentalities of interstate commerce that actually move across state lines (people or things) (ex. Heart of Atlanta = can proscribe racial discrimination in public accommodations along interstate highways)
      iii. Activities having a substantial relation to IC (even though wholly intrastate)
         1. Test: Congress needs a RB (w/ findings! (Lopez)) that activity substantially affects interstate commerce (Raich = can regulate noneconomic intrastate activities (articles for home use) if necessary for a broader economic scheme (b/c fungible))

      Also preemption!
      a. Purely local activities can be aggregated to meet this test, but only if they are economic in nature (Morrison)
      b. For enumerated powers to mean something there must be limits and national/local distinction! Can’t be too attenuated.
   2. Regulates activity, never inactivity. (Florida Health Care Case)
2. External constraints (always constraints on Congress, but come up mostly in CC context)

   a. 10th Amendment (2 Qs: is Act invading Zone of Activity and is it commandeering?)

     i. Normative questions:
        1. Substantive: should the matter be left to the state or federal government?
        2. Institutional: should judicial intervention or the political process resolve these questions? After all, Congress is made up of state representatives.

     ii. 2 interpretations:
        1. Express Reminder/Truism (doesn’t actually do anything) (Darby)
           a. Congress acts only if they have the authority, but if they do then they can override state prerogatives

        2. Zone of Activities (substantive)
           a. Reserves methods solely for state control (Garcia). Congress cannot violate such a zone even if Art. I §8 allows it (prevent tyranny)
           b. What is within the sole province of the states?
              i. Original powers of states (before federal government) reserved by the 10th Amendment (US Term Limits = power to add qualifications created by the existence of the national government)
              ii. Powers delegated by the Constitution to the states
              iii. Not the power to burden the union or other states (US Term Limits = adding term limits dumbs Congress and hurts the country)

     iii. Congress can’t commandeer (aka coerce into action) state legislative process
        1. Limits on methods of regulation, not subject matter
           a. Not limits on subject matter since effort to define traditional gov. functions that are immune from fed regulation is unworkable (Garcia = political process should sort out whether municipal transit authority is subject to minimum wage laws, and it has by this law being passed. Ok to use CC to regulate state employees! Overruled National League of Cities)

        2. Can’t:
           a. Single out states (NY = tax on bottled water from state-owned springs is ok b/c not a source of revenue capable of being earned only by a state)

           b. And tell them exactly what to do (Printz = can’t issue directives requiring states to address problems through legislation or command state officers to enforce federal regulatory programs, here can’t make local cops perform federal gun background checks)
              i. Have to offer real choices that would be ok to offer alone (NY = choice between taking title to waste and being sued as the owner of the waste is not a choice because both coerce state
governments into service of feds, but ok to offer choice between regulating w/out specifics and being preempted by ok fed regs.)

3. Can regulate states as private actors along with individuals
   a. State autonomy is not violated if state is regulated as a private actor/the law is generally applicable (Reno = ok to limit sales of databases since regulating states as commercial actors, even though de facto it’s just the DMV)
   b. 11th Amendment (enacted to overrule Chisholm which allowed SC citizen to sue GA)

3. Commerce Power (Pre-New Deal)
   a. Clause 3 – To regulate commerce with foreign nations, and among the several states, and with the Indian tribes
      i. What is commerce – is it one stage of business or does it include all aspects of business?
      ii. What does among several states mean – limited to instances where there’s a direct effect on interstate or any affect on interstate?
      iii. Does 10th limit Congress?
   b. Commerce = all activity affecting 2+ states (Gibbons v. Ogden)
      i. Every species of commercial intercourse concerns >1 state
      ii. Congress could regulate intrastate commerce if it had an impact on interstate activities
      iii. Includes navigation, transportation, or traffic
   c. Direct vs. Indirect Effects Test - Did regulated activity have direct or indirect effect on interstate commerce?
      i. US v. EC Knight – power over interstate commerce could not extend into realm since manufacturing was local activity and regulation of it was a state power
         1. Relationship was too indirect to allow federal regulation under commerce

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<tr>
<th><strong>Within Congressional Power</strong></th>
<th><strong>Beyond Scope</strong></th>
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<tbody>
<tr>
<td>Primary effects</td>
<td>Secondary or incidental</td>
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<tr>
<td>Direct trade</td>
<td>affect on trade</td>
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<tr>
<td>Subject of commerce</td>
<td>Internal policing</td>
</tr>
<tr>
<td>Transportation of goods across</td>
<td>Manufacture of those goods</td>
</tr>
<tr>
<td>interstate lines</td>
<td></td>
</tr>
<tr>
<td>Instrumentalities of transportation</td>
<td>Indirect results of trade</td>
</tr>
</tbody>
</table>
d. **Substantial Economics Effects Test** – practical physical or economic effects of regulated intrastate activities on interstate commerce
   i. Congressional power to regulate any activity, local or interstate, that either in itself or in combination with other activities has a “substantial economic effect upon,” or “effect on movement in,” interstate commerce

   1. **Huston E. & WT RR Co**– Upheld ability to ICC to set intrastate RR rates because direct impact on interstate
      a. Wherever interstate and intrastate transactions of carriers are so related that government of one involves control of other, Congress (not state) entitled to prescribe final rule

e. **Stream of Commerce Test** – regulate some local activities because they are an integral part of current commerce

   i. **Swift & Co. v. United States** – activities took place within 1 state but effect direct: object of conspiracy = restrain sales of live stock from other states

   ii. **National Police Regulation (Morality/Public Safety)**

<table>
<thead>
<tr>
<th>Champion v. Ames</th>
<th>Hoke v. United States</th>
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<tr>
<td>for purpose of guarding people of US against widespread dangers of lotto and to protect commerce which concerns all states, Congress may prohibit carrying of lotto tickets from one state to another</td>
<td>Congress could prohibit transportation of own interstate commerce for immoral purposes (prostitution)</td>
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<th>Hipolite Egg Co. v. United States</th>
<th>Hoke v. Dagenhart</th>
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<tr>
<td>Congress could prohibit sale of impure or adulterated food or drugs</td>
<td>Congress could not prohibit interstate transportation of goods manufactured with child labor No inherent dangerousness in shipment (overruled)</td>
</tr>
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</table>

2. **Commerce Power (New Deal)**

   a. Court did not consistently apply stream of commerce approach – among the states as requiring direct effect on interstate commerce

   i. **Railroad Retirement Board v. Alton Railroad** – Congress lacked power to establish compulsory retirement and pension plan for all carriers

   ii. **Schechtech Poultry Corp.** - Application to intrastate exceeded power and slaughterhouse which only sold to local retailers were not subject to federal control (invalidated New Deal Legislation)
      1. Concerned with operation of business within NY

   iii. **Carter v. Carter Coal Co.** – Wages, working conditions, bargaining all constitute purpose of production, not trade
      1. Narrow definition essential to protect states
3. Commerce Power (After New Deal) 1937 – 1955 ➞ almost every federal reg upheld

a. Close and Substantial Relationship—expansively defined scope ➞ from 1937 – 1955 NO federal law declared unconstitutional as exceeding commerce power

i. *NLRB v. Jones & Laughlin Steel* – power is plenary and may be extended to protect interstate commerce no matter the source of dangers which threaten it
   1. Congressional authority not limited to transactions which can be deemed essential part of flow of interstate or reign
   2. Although may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce their control is essential or appropriate to protect that commerce from burdens and obstructions

ii. *United States v. Darby* – Congress may control production by regulating shipments in interstate commerce *(Overruled Hammer/Child Labor)*
   1. Manufacture not itself interstate commerce, shipment of manufactured goods is such commerce and prohibition of such shipment by Congress is regulation of commerce
      a. 10th Amendment is not a restriction on Congress

iii. *Wickard v. Filburn* – Upheld act because cumulative effect on national market – even if activity is local and not regarded as commerce it may still be reached by Congress if it exerts a *substantial economic effect* on interstate commerce
   1. Questions of power not decided by reference to formula which gives controlling force to production and indirect of actual effects upon interstate commerce
   2. Cumulative effect of many instances such as production can be felt on supply and demand of interstate commodity market

b. Commerce Power and Civil Rights / Crime

i. *Heart of Atlanta Motel v. United States* – is activity sought to be regulated commerce which concerns more states than one and has real and substantial relation to national interest
   1. Power to promote interstate commerce also includes power to regulate local incidents including local activities in both states of origin and destination which might have substantial and harmful effect upon that commerce

ii. *Katzenbach v. McClung* – Restaurants in such areas sold interstate goods
   1. Discrimination in restaurants posed significant burdens on interstate flow of food and upon movement of products generally

iii. *Perez v. United States* – certain crimes by their very nature are interstate
   1. Purely intrastate actually affects interstate and foreign commerce
4. Modern c. 1995

a. Congress can regulate
   i. Channels of interstate commerce
   ii. Instrumentalities, persons, things of interstate commerce
   iii. An economic activity which substantially affects interstate commerce

b. Approach:
   i. Is the activity economic or commercial?
   ii. Jx element in the statute – limiting application to things that travel in
      interstate - Lopez act eventually passed because of Jx reasons.
   iii. Congressional Findings – Although typically not persuasive enough on
      their own.
   iv. Attenuated connection – not always a problem – worked in Gonzales
   v. Are the states historically sovereign in this area (police power)?
   vi. Is it part of a broader regulatory scheme? (regulation of drug enforcement,
      as in Gonzales)

c. Cases
   i. United States v. Lopez – federal statute barring possession of gun in
      school zone is invalid – it interferes with state power
      1. If regulated intrastate activity is non-commercial and non-
         economic, cannot regulate unless Congress can factually show a
         substantial economic effect on interstate commerce
   ii. United States v. Morrison – Gender motivated violence is not economic
      activity – attenuated connection and states are historically sovereign
      1. Even though there were surrounding circumstances of economic
         activity, the regulated activity itself is not commercial
   iii. Gonzales v. Raich – upheld regulation of intrastate cultivation and use of
      marijuana because it was part of comprehensive federal program to
      combat interstate traffic in illicit drugs
      1. Economic or commercial activity,
      2. Court can conceive rational basis,
      3. On which Congress could conclude activity in aggregate
         substantially affects interstate commerce

5. Do federalism-based limits on commerce power have any application to N&P Clause

<table>
<thead>
<tr>
<th>United States v. Comstock – whether statute constitutes is rationally related to the implementation of a constitutionally enumerated power</th>
<th>NFIB v. Sebelius – you can’t compel people to buy into plan, CC only regulates when they are buying. It does not make them buy stuff</th>
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<tbody>
<tr>
<td>- Necessary and Proper Clause grants broad authority.</td>
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<td>- Congress long delivered mental health care to federal prisoners</td>
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<td>- Congress had good reason to pass the statute as it has the power to protect nearby communities from the danger prisoners may pose</td>
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<td>- 10th does not reserve zone of authority to the states in this context</td>
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<td>- Court recognized: statute narrow in scope: Didn’t confer general police power</td>
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Legislative Powers: Tax and Spending

1. **Article I § 8** – power lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States → form = tax or expenditure

   a. **Views**

      | Hamilton – structurally re: grammar | Madison – confined to 10th Amendment powers |
      | Have to have some purpose          |                                           |
      | Otherwise N&P Clause would have    |                                           |

   b. **United States v. Butler** – Agricultural provision to regulate and control agriculturally production as matter beyond power delegated to federal government
      i. Congress has power separate and distinct from later enumerated powers
      ii. Power to tax and spend is distinct constitutional power fully effective without reference to other granted powers

   c. **Steward Machine Co. v. Davis** – Congress may use spending power to create incentives for states to act in accordance with federal policies but when pressure turns into compulsion legislation is against federalism
      i. Tax (Social Security Act) constitutional: uniform throughout states and did not coerce states in contravention of 10th Amendment

      1. **Distinguish from Butler:**
         a. Proceeds are not earmarked for special group
         b. Unemployment compensation law which is condition of credit has had approval of state and could not be law without it
         c. Condition is not linked to irrevocable agreement because states can repeal whenever they want
         d. Condition is not directed to attainment of unlawful end but to an end: relieve unemployment

   d. **South Dakota v. Dole** – 5% tax on federal highway funds that didn’t have 21 year old drinking age upheld – Congress may attach conditions on receipt of federal funds to further broad policy objectives by conditioning receipt upon compliance with federal directives . . . must be pursuit of general welfare, consider:
      i. Condition related to expenditure?
      ii. Condition expressed in unambiguous manner?
      iii. Financial inducement so great as to be coercive or compulsory?
      iv. Other constitutional concerns raised?

   e. **NFIB v. Sebelius** – rejected Medicaid – all funding would be pulled – 10% of TOTAL budget = coercion – CC could not force to buy but impose tax to encourage

      i. **Distinguish penalty from tax:**
         1. Exceedingly heavy burden regardless of infraction
         2. Imposed only on those who knowingly engage in activity (punitive)
         3. Tax enforced by department/agency for punishing violations, not collecting revenue (where it was here)
Legislative Powers: Treaty & War Power

1. Article 1 § 8
   a. Clause 11 – declare war, raise and support armies, provide for and maintain navy, make rules for government and regulation of armed forces, and organize arm, discipline and all up the militia
   b. Clause 18 – Necessary & Proper

2. Cases & Concepts
   a. Validly extended to post-war times to both remedy wartime disruptions and to cope with exigencies
      i. Woods – setting rent control under Housing and Rent Act and established such a power under war powers
         1. Includes power to remedy evils which have risen from rise and progress and continues for duration of that emergency
         2. Where war power contributed heavily to deficit, Congress has power even after cessation of hostilities to act to control forces that short supply
      ii. Missouri v. Holland – treaty with GB protecting migratory birds – under N&P may enact always necessary to execution of valid treaty
         1. Constitution does not limit C to enumerated powers when implementing a treaty
         2. Congress has powers pursuant to treaty power to make laws that will implement treaty
         3. To extent Congress can make treaty \(\rightarrow\) states’ 10th not abrogated
Federalism: Powers of State Under 10th Amendment

1. **10th Amendment** – Amendment –Powers not delegated to US by Constitution for states

<table>
<thead>
<tr>
<th>Pro-Federalism</th>
<th>Anti-Federalism</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problems vary geographically – tailor policies</td>
<td>Ineffective – negative externalities that flow across state boundaries</td>
</tr>
<tr>
<td>Diversify according to varying preferences</td>
<td>Government can provide certain public goods that state government will under produce because subject to free riders and cannot completely capture benefits of investment</td>
</tr>
<tr>
<td>State experimentation social policy can yield new practices</td>
<td>Large scale and collective resources can provide better social insurance</td>
</tr>
<tr>
<td>Government closer to citizenry</td>
<td>Prevent destructive competition and races to bottom among states</td>
</tr>
<tr>
<td></td>
<td>Regulation can help protect basic rights against tyranny of local externalities</td>
</tr>
</tbody>
</table>

a. **Coyle v. Oklahoma** – invalidated condition that federal government could specify state capital

b. **New York v. United States** – Federal government may not compel states to enact or administer federal regulatory program
   i. Congress may set standards that state and local governments must meet and thereby preempt state and local actions

c. **Garcia v. San Antonio Metro** – overruled *National League* - Congress, which is composed of representatives from the states, must make the necessary judgments about the scope of any intrusion upon state sovereignty
   i. Defining traditional governmental functions immune from federal regulation **unworkable**

   1. **National League of Cities v. Usery** – Congress violates 10th when it interferes with traditional state and local government functions

d. **Printz v. United States** – Unconstitutional where act requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers
   i. Congress **commandeering** state executive officials to implement federal mandate – violated 10th when it conscripts state governments

   1. Prohibits Congress from adopting statute that commandeers state officials by requiring states to regulate own citizen
Federalism: State Sovereign Immunity & 11th Amendment

1. **11th Amendment** – Judicial power of US shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of States by Citizens of another State, or by Citizens or Subjects of any Foreign State
   a. Jurisdictional bar that modifies judicial power by prohibiting federal court from hearing private party’s foreign government’s claim vs. state government
   b. 11th Amendment overruled *Chisholm v. Georgia* by narrowing subject matter jurisdiction of federal judiciary to ensure states could no longer be sued in federal court simply because

2. **Summary**
   a. 11th prohibits federal court from hearing claim for damages vs. state government (state officers ok though) UNLESS
      i. State consented to allow suit
      ii. π is US or another state
      iii. Congress clearly granted courts authority to hear – 14th prevent discrimination

<table>
<thead>
<tr>
<th>11th Amendment Bar</th>
<th>No 11th Amendment Bar</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action against state government for damages</td>
<td>Actions against local governments (municipalities/counties)</td>
</tr>
<tr>
<td>Actions against state governments for injunctive or declaratory relief where state is named party</td>
<td>Actions by US or other state governments</td>
</tr>
<tr>
<td>Actions against state government officers where effect will be that retroactive damages will be paid from state treasury OR</td>
<td>Bankruptcy Proceedings</td>
</tr>
<tr>
<td>Where action is functional equivalent of quiet title action that would divest state of ownership of land</td>
<td></td>
</tr>
<tr>
<td>Actions against state government officers for violating state law</td>
<td></td>
</tr>
</tbody>
</table>

**Barred by Sovereign Immunity**

<table>
<thead>
<tr>
<th>Suits vs. state in state court even on federal claims without state’s consent (<em>Alden</em>)</th>
<th>Some actions vs. state officers: <strong>Injunctions</strong> – refrain from future action that violates federal law or take <strong>prospective action</strong>: comply w/ const. mandates (<em>Ex parte Young</em>)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adjudicative actions vs. states and its agencies before federal administrative agencies (<em>Federal Maritime Commission</em>)</td>
<td>Actions vs. State officers for $$ - Pay out of own pocket</td>
</tr>
<tr>
<td></td>
<td>For Prospective payment from state – where effect to force state to pay but not if retroactive payments (<em>Edelman</em>)</td>
</tr>
</tbody>
</table>
3. Congressional Removal Under 14th Amendment
   a. Fitzpatrick v. Blitzer – Equal Pay Act can serve as basis for federal suits against state by its employee

   b. Seminole Tribe of Florida v. Florida – Congress’s legislative powers under Article I do not include power to abrogate state immunity
      i. BUT: Central Virginia CC v. Katz – states may not assert sovereign immunity in proceedings arising under bankruptcy laws

   c. United States v. Morrison – 14th Amendment only prohibits state action so Congress may not regulate private conduct under § 5
      i. Congruence & Proportionality – test to determine if legislation within Congress’ power
         1. Evidence of issue AND
         2. State specifically targeted class/group
         3. Must be constitutionally guaranteed right

4. Meaning and Scope of Morrison
   a. Kimmel v. Florida Board of Regents – Congress exceeded 14th remedial authority in allowing state employee to sue states for violation of Age Discrimination in Employment Act

   b. Board of Trustees University of Alabama v. Garret – States not required to make special accommodations for disabled provided actions toward individuals = rational

   c. Tennessee v. Lane – Classification on disability violate rational relationship requirement to legit governmental purpose

   d. United States v. Georgia – Court assumed paraplegic prisoner, in alleging prison officials deliberately refused to accommodate disability-related needs, had stated claims based on conduct that independently violated § 1 of 14th incorporating 8th cruel and unusual punishment provision

   e. Nevada Department of HR v. Hibbs – Congress must ID not just existence of age or disability based state decisions but a wide spread pattern of irrational reliance on such criteria
Federalism: Preemption Under Supremacy Clause

1. State law must yield to Constitution and permitted federal laws and treaties
   a. If law is preempted by Congressional action it is invalid under Supremacy Clause

2. Express Preemption
   a. State law invalid if Congress intended to displace it

3. Implied
   a. Where federal laws are comprehensive or federal agency is created to oversee area
      i. BUT where historically state power: presumption that historic state police powers not to be superseded unless clear and manifest purpose of Congress
   b. Regulatory Field
      i. Obstacle – clear showing congress intended to occupy field and did not leave room for states
   c. Conflict Preemption
      i. Impossibility preemption – impossible to comply with both state and federal regulations
Dormant Commerce Clause Analysis

1. If Congress has not enacted laws regarding subject, state or local government may regulate local aspects of interstate commerce where

   a. **Not discriminate vs. out-of-state competition to benefit local economic interests** AND

   b. **Is not unduly burdensome**

      i. Incidental burden on interstate commerce does not outweigh legitimate local benefits produced by regulation

2. **Facially Discriminatory Regulations (Almost Always Invalid!)**

   Use **strict scrutiny** – Is the law narrowly tailored to a **compelling state interest**

<table>
<thead>
<tr>
<th>Protecting Local Businesses</th>
<th>Requiring Local Operations</th>
<th>Limit Access to In-State Products</th>
<th>Prohibit OOS Wastes</th>
</tr>
</thead>
<tbody>
<tr>
<td>State cannot place surcharge on OOS milk to make that milk as expensive as (or more than) milk produced in the state</td>
<td>If a state law requires a business to perform specific business operations in the state to engage in other business activity within the state, the law will normally be held invalid as an attempt to discriminate against other states where the business operations could be performed more efficiently</td>
<td>A state law that makes it difficult or impossible for out-of-state purchasers to have access to in-state products (other than products owned by the state itself) is likely to be held invalid</td>
<td>A state may not prohibit private landfill or waste disposal facilities from accepting out-of-state garbage or waste or surcharge such waste</td>
</tr>
<tr>
<td>State cannot exempt local businesses or products from taxation or regulation that it seeks to apply to out-of-state businesses or products that come into the state</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Law requiring all locally produced solid waste to be processed at a local waste processing business was held to violate the Commerce Clause because it was a trade barrier against competition from out-of-state waste processors</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Exceptions**

1. **Necessary to important state interest**
   a. Furthers important non-economic state interest
   b. *Maine v. Taylor* – prohibited importation of live batfish b/c state showed had no other way to effectively avoid parasite prevention

2. **State as market participant**
   a. Does not prevent state from preferring own citizens when state is acting as MP – buying/selling products, hiring labor, giving subsidies → note not private!
      i. *White v. Massachusetts* – city may require all construction projects funded by city be performed by contractors using workforce of at least 50% residents of city

3. **Favoring Government Performing Traditional Government Functions**
   a. Likely motivated by legit objectives rather than economic protectionism
   b. *Oneida* – county flow ordinance favored state-created public waste facility requiring haulers to bring to state rather than private facilities
3. **Facially Neutral But Discriminatory Purpose and/or Effect**
   Use strict scrutiny – Is the law narrowly tailored to a compelling state interest

   a. *Hood* – Can’t deny additional milk shipping facilities b/c curtails movement of articles of commerce to advance state interest

   b. *Baldwin* – can’t set minimum to be paid to milk producers by NY dealers b/c can’t place yourself in economic isolation even if you want to stabilize milk prices during Depression

   c. *Washington Apples* – not ok to require apple containers bear US standard b/c Washington uses its own standard which is stricter. Law was neutral on its fact but hurt WA and not justified by interest of eliminating confusion in market b/c nondiscriminatory alternatives

   d. *Bacchus* – not ok for Hawaii to exempt a brandy made from plant only grown in Hawaii from 20% tax b/c purpose and effect is discrimination in favor of local product so can’t help a struggling local industry this way

   e. *Exxon* – ok to prohibit oil producers from operating gas stations b/c does not favor local producers or discriminate against interstate goods

   f. *Clover Leaf* – ok to ban sale of milk in plastic containers but allow it in pulpwood containers even though plastic is made by non-state firms while pulpwood comes from in-state firm b/c CC protects interstate market, not particular firms, from burdensome regulations

4. **Non-discriminatory (facially and actually neutral) that burden interstate commerce**

   a. Not discriminatory but exact undue burden (difficult to prove)

   b. Case by case basis

   c. Pike Test
      i. Where the statute regulates even-handedly to effectuate a legitimate local public interest,
         1. And its effects on interstate commerce, are only incidental
            a. Upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits

   d. Consider
      i. Less restrictive alternatives
      ii. Absence of conflict with other states

   e. Extent of the burden that will be tolerated depends on:
      i. Nature of local interest involved and
      ii. Whether it could be promoted as well with a lesser impact on interstate activity (least restrictive means like in SS)
Article IV Privileges and Immunities

1. Another way to challenge restrictive state laws even though Congress has not acted, but must be a discriminatory law that restricts fundamental rights or important economic activities and plaintiff must be an out of state citizen
   a. No exceptions
   b. Gets intermediate scrutiny

2. Compare to Dormant Commerce Clause

<table>
<thead>
<tr>
<th></th>
<th>DCC</th>
<th>Article IV Privileges and Immunities</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Laws implicated</strong></td>
<td>Any law that burdens interstate commerce (discriminatory or not)</td>
<td>Discriminatory laws that burden fundamental rights</td>
</tr>
<tr>
<td><strong>Exceptions</strong></td>
<td>--Market participant --Congress expressly approves</td>
<td>None (not waivable by Congress)</td>
</tr>
<tr>
<td><strong>Plaintiff</strong></td>
<td>--Corporations --States --Individuals (in or out of state citizen or not)</td>
<td>Out-of-state citizens (in-state citizens can remedy these problems at the ballot box!)</td>
</tr>
<tr>
<td><strong>Scrutiny</strong></td>
<td>Strict scrutiny (discriminatory laws) or <em>Pike</em> balancing (nondiscriminatory laws)</td>
<td>Intermediate scrutiny</td>
</tr>
</tbody>
</table>

3. Methodology
   a. Is state/local law discriminatory against out of state citizens?
   b. If so, does the activity in question involve a **fundamental right**?
      i. Pursuit of a common calling (*Camden*), attorney practicing law (*Barnard*), private employment (*Piper* = can’t limit bar admission to in-state residents)
      ii. Not recreational big-game hunting (*Baldwin* = not an essential activity or exercise of a basic right, although if means of livelihood then yes)
   c. If so, does the state/locality have sufficient justification for their discrimination?
      i. Apply **intermediate scrutiny**:
         1. Does state/locality have a substantial reason for discrimination?
         2. Is the law closely/substantially related to achieving that purpose?
            a. The more alternatives you find, the less related the law looks
         3. Are out of state citizens a “peculiar” evil? (*Hicklin* = Alaska did not show nonresidents were a peculiar evil, so law which aimed to remedy high unemployment cannot discriminate against them)
   d. Note: not exempt from **facially** constitutional laws just b/c you found a crazy plaintiff (then only unconstitutional **as applied**)

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# Executive Powers

## 1. Executive Powers

a. Article I

b. Article II

i. § 1 – executive power vesting in President of USA

ii. § 2 – Commander in chief: army, navy, militia of several states

1. Treaty power with 2/3 Senate

2. Appointments of inferior officers

iii. § 3 – Take Care Clause – that laws faithfully executed, commission of all officers

c. 12th Amendment – electoral college
d. 20th Amendment – term dates, succession before swearing in
e. 22nd Amendment – two term limit

f. 25th Amendment – case of removal by death or resignation: VP

g. *Youngstown Sheet & Tube Co. v. Sawyer* – Presidential power must issue from Constitution or act of Congress

i. **Pursuant to Congressional Authority** - Article II + Congressionally delegated power (Valid)

ii. **Congressional Silence: Twilight Zone** – rely on independent powers

1. Upheld as long as act does not take over powers of another branch or prevent another branch from carrying out task

iii. **To Act contrary to Congressional Direction** – his powers minus congress’ powers

<table>
<thead>
<tr>
<th><strong>1 = Maximum Power</strong></th>
<th><strong>2= Zone of Twilight</strong></th>
<th><strong>3= Minimum Power</strong></th>
</tr>
</thead>
</table>
| **Test** P acts with: | • No grant or denial by C | • P acts inconsistent with express/implied will of C
| Consultation + Express/implied authority from C (can be implied by refusing to deny it) | • P's power from Constitution alone (so point to it!) | ➔ Is it really inconsistent?
| Note: must be constitutional act | • Past practice an influential guide | • Can be implied by refusing to grant it |

<table>
<thead>
<tr>
<th><strong>Winner</strong> P wins unless Constitution expressly reserves matter only to C</th>
<th>P loses unless Constitution expressly reserves matter to P</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cases</strong></td>
<td><em>(Dames &amp; Moore = ok for President to suspend claims through exec. agree. b/c C implicitly approved tradition of claim)</em></td>
</tr>
</tbody>
</table>
2. Non-Delegation Doctrine – Congress may not delegate its legislative power to administrative agencies

   a. Article I § 7

      i. Unconstitutionality of Legislative Veto -

         1. *INS v. Chada* – invalidating, legislative veto provision impairing President’s role in lawmaking process, even though statute containing veto provision had been signed by President

            a. Congress may only legislate if there is *bicameralism* AND *presentment*


            a. Must reject/accept bill as a whole

            b. Provision of Line Item Veto Act

               i. Any dollar amount of discretionary budget authority

               ii. Any item of new direct spending

               iii. Any limited tax benefit

               1. Must come to determination

                  a. Reduce federal budget deficit

                  b. Not impair essential government functions and

                  c. Not harm national interest

   b. Appointment Power – Article II § 2 Clause 2

      i. Analysis

         1. Is the office one in which independence from the president is desirable?

            a. Are Congress's limits on removal constitutional?

      ii. President *appoints* superior officers like cabinet heads with advice and consent of Senate

         1. BUT Congress vest appointment of inferior officers in either President acting solo, the heads of departments or Courts of law

      iii. President has the power to *remove* executive officials, but Congress may limit the removal power if it is an office where independence from the president would be desirable (Note: constitution silent on removal)

         1. Congress cannot give itself power to remove officer charged with execution of laws *except via impeachment*

            a. Through legislation is invalid as bill of attainder
2. Nor can Congress prescribe double layer of protection from presidential removal whereby “inferior officers” may be removed only for just cause by “officers” who may be removed by the President only for just cause.

iv. Superior Officers

1. Buckley v. Valeo – Unconstitutional for Speaker of the House of Representatives and the president pro tempore of the Senate to appoint members of the Federal Election Commission
   a. Congress may not appoint members of body with admin or enforcement powers because they’re officers of US and must be appointed by President

2. Bowsher v. Synar – Congress cannot give itself power to remove executive officials - impermissible delegation of executive power to legislative officials
   a. Comptroller General is a superior executive officer, but congress maintained control over him because they set the budget and based on the regulation – really subservient

v. Inferior Officers

1. Myers v. United States – Congress cannot limit presidential removal of executive officers without consent of Senate
   a. Power to remove… is an incident of the power to appoint
   b. President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate

2. Humphrey’s Executor v. United States - Congress, pursuant to its powers under Article I, could create independent agencies and insulate their members from presidential
   a. “quasi-legislative” or “quasi-judicial” positions are different and that Congress may limit the removal of these individuals

3. Morrison v. Olson - independent counsel, who exists to investigate and prosecute alleged wrongdoing in the executive branch of government, ideally should be independent of the president
   a. Upheld the constitutionality of limits on the president's ability to remove the independent counsel.
   b. Permissible for Congress to vest appointment in the federal courts because the independent counsel is an “inferior” rather than a “principal” officer.
   c. Congress had no role in removing the independent counsel.
   d. Factors for Inferior Officers
      i. Subject to removal from superior officer
      ii. Limited tenure
      iii. Limited JX
c. **Executive Privilege**
   
i. Not in Constitution
   
   ii. Presidential *documents and conversations* are *presumptively privileged*, but the privilege must yield to the need for such materials as evidence in a criminal case to which they are relevant and otherwise admissible.
      
      1. Made by the trial judge after hearing the evidence.
   
   iii. **National Security Secrets** – military, diplomatic, or sensitive national security secrets are given great deference by courts
   
   iv. **Criminal** – where such need for information is demonstrated
      
      1. *United States v. Nixon* – must comply with subpoena - Absent claim military protection, diplomatic, or sensitive national security secrets no confidentiality of Presidential communications
   
   v. **Civil** – President may not be sued for injunctions or money damages for actions taken while in office
      
      1. *Clinton v. Jones* – suit against a president should be neither stayed nor dismissed if it is based on conduct that allegedly occurred prior to his taking office
      
      2. *Nixon v. Fitzgerald* – Immunity while in office - unique status under the Constitution” and the “singular importance” of the duties of the office justify absolute immunity
         
         a. President or ex-president may not be sued for damages for conduct during the president’s term in office

d. **Power Over External Affairs**
   
i. Executive Agreements – do not require super majority, binding in international law regardless of domestic rules
      
      1. BUT following president not bound
   
   ii. *United States v. Belmont* – allowed release of Russian held funs
      
      1. EA constitutional and follow supremacy clause over state laws
   
   iii. *Dames & Moore v. Regan* – entered into EA with Iran for release of prisoners
      
      1. President acting with congressional approval or in twilight zone
Bill of Rights

<table>
<thead>
<tr>
<th>Article IV P+I Clause</th>
<th>14th Amendment P/I Clause</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;Citizens of each state shall be entitled to the P and I of the citizens in the several states&quot;</td>
<td>&quot;No state shall make or enforce any law which shall abridge P or I of citizens of the US&quot;</td>
</tr>
<tr>
<td>Affirmative</td>
<td>Restrictive</td>
</tr>
<tr>
<td>Citizens of several states</td>
<td>Citizens of US</td>
</tr>
<tr>
<td>Plaintiff = out-of-state resident suing state</td>
<td>Plaintiff = out-of- or in-state resident</td>
</tr>
<tr>
<td>Conditions = disparate treatment based on citizenship</td>
<td>Conditions = minimum the state must provide</td>
</tr>
<tr>
<td>Fundamental rights</td>
<td>?</td>
</tr>
</tbody>
</table>

1. **14th Amendment Privileges & Immunities Clause**

   a. Corporations not protected → not citizens

   b. Bill of Rights not included
      i. *Slaughterhouse* – fundamental rights protected against federal abuse not privileges or immunities of national citizenship
         1. BOR protected only by DPC and EPC

   c. Right to Travel
      i. Protected by 14th
      ii. Newly arrived citizens enjoy same P&I enjoyed by other citizens of state
         1. *Saenz v. Roe* – unconstitutional for CA to limit welfare benefits of 1st year residents

2. **Substantive Due Process**

   a. **Test** – *McDonald v. City of Chicago*
      i. Is the right fundamental to our scheme of ordered liberty?
      ii. Is right deeply rooted in nation’s history and traditions?

   b. Selective Incorporation Approach

<table>
<thead>
<tr>
<th>Rights Not Applicable to States</th>
<th>Rights Applicable to States</th>
</tr>
</thead>
<tbody>
<tr>
<td>3rd – quartering troops</td>
<td>1st – speech, press, assembly, petition etc.</td>
</tr>
<tr>
<td>5th – grand jury indictment in criminal</td>
<td>2nd – right to bear arms</td>
</tr>
<tr>
<td>7th trial by jury in civil</td>
<td>4th – unreasonable search and seizure</td>
</tr>
<tr>
<td>8th – against excessive fines</td>
<td>5th – (some) self incrimination, eminent domain</td>
</tr>
<tr>
<td>6th – speedy public trial by jury</td>
<td>8th – cruel and unusual punishment</td>
</tr>
</tbody>
</table>

9th and 10th don’t need to be
### Levels of Judicial Scrutiny

<table>
<thead>
<tr>
<th>Applies to:</th>
<th>Rational Basis</th>
<th>Intermediate</th>
<th>Strict</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Default (specifically CC and economic liberty under DPC)</td>
<td>Art IV P+I</td>
<td>• Discriminatory DCC laws</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Fundamental rights under DPC</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• 14th P/I</td>
</tr>
<tr>
<td>Government Ends/Goals</td>
<td>Legitimate</td>
<td>Important/substantial</td>
<td>Compelling</td>
</tr>
<tr>
<td>(purpose of law)</td>
<td>Rationally related to goals (i.e. not arbitrary)</td>
<td>Substantially or closely</td>
<td>(moral repugnancy alone is not enough)</td>
</tr>
<tr>
<td></td>
<td>Gov can use post hoc reasons, or court can make up its own</td>
<td>related to goals</td>
<td>Necessary/narrowly tailored (i.e. the least restrictive</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>means to achieve goal)</td>
</tr>
<tr>
<td>Government Means/Methods</td>
<td>Gov. likely prevails</td>
<td>High deference to government</td>
<td>D likely prevails</td>
</tr>
<tr>
<td>(how law accomplishes</td>
<td>Unclear</td>
<td></td>
<td></td>
</tr>
<tr>
<td>purpose)</td>
<td>Substantially or closely related to goals</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Necessary/narrowly tailored (i.e. the least restrictive means to achieve goal)</td>
<td></td>
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</tbody>
</table>

Gov has to show (with evidence) why they actually passed the law. No post hoc reasons.

### 3. Economic Liberty

a. **Originally thought to be protected by DPC and SS** (*Lochner* = state cannot limit hours of bakers b/c interferes with fundamental right of freedom of contract and no reasonable relationship between law and police powers…although do they really have freedom to contract with unequal bargaining power?)

b. **Now only subject to RB and few are struck down** (*Nebbia* = state can fix selling price of milk b/c want to pay producers to make sure milk is safe since it’s so important, so not arbitrary law and therefore ok) (*Lee Optical* = state can make it illegal for anyone but an optometrist/ophthalmologist to replace lenses b/c state might have concluded many nonarbitrary reasons, like encouraging eye exams)

i. As long as state has a police power justification (broad) and no independent provision of the Constitution forbids it, it’s ok

ii. **Why? Switch in Time Saved 9 after The Depression** (*West Coast Hotel* = overruled *Adkins* and upheld state minimum wage law for women b/c freedom to contract is not in the Constitution, court is on judicial notice of Depression)

iii. *Lochner* is vilified (Holmes’ dissent)

1. State has **police powers** (to protect health, safety and morals of citizens) and judiciary is not competent to second-guess state’s use of them
a. There’s always a political check (Carolene footnote 4 = ok for feds to prohibit interstate shipment of filled milk b/c fraud on the public since judiciary should presume existence of facts supporting legislative judgment. BUT this presumption of competence is narrowed when law affects specific prohibition of Constitution and/or political process is not as available to protect civil liberties of discrete and insular minorities)

2. This was a way to find a certain economic system in the Constitution that isn’t there (“accident of finding certain opinions novel…ought not to conclude…”)

c. Punitive Damages (BMW v. Gore)
   i. Has Δ had fair notice of possible magnitude of damages?
      1. Reprehensibility of Δ’s conduct
      2. Disparity: harm suffered and punitive award
      3. Difference between PD and Crim/Civ penalties authorized for comparable misconduct
   ii. Basic Rule – except for particular egregious conduct especially when conduct resulted only in small compensatory damages – P-damages should not exceed 10 times compensator (State Farm)

<table>
<thead>
<tr>
<th></th>
<th>Lochner (1905)</th>
<th>Lee Optical = death knell for Lochner (1955)</th>
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<tbody>
<tr>
<td>State Power</td>
<td>Paternalism &amp; redistrib. of $ = invalid goals</td>
<td>Can redistribute or favor some economic interests</td>
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<tr>
<td>Fundamental right?</td>
<td>Yes. Economic liberty is a fundamental right</td>
<td>No. Economic liberty is not a fundamental right</td>
</tr>
<tr>
<td>SCOTUS' scrutiny</td>
<td>SS. Whether max hours/min wages actually achieve goals</td>
<td>RB. Only ask if goal is conceivable and if means could rationally achieve it (passes the laugh test)</td>
</tr>
<tr>
<td>Default assumption</td>
<td>Wealth distribution is &quot;natural&quot; and beyond government control</td>
<td>Economic distributions are created by law and can be altered by law</td>
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</table>
4. Personal Liberty (aka privacy rights)
   a. Why is this different from *Lochner*?
      i. Freedom to contract isn’t fundamental (inherently legal, not personal)
         1. Constitution isn’t inherently capitalist. Freedom to K didn’t exist prior to government and does not affect minorities with no political remedy (*Carolene*)
      ii. Privacy is fundamental to personhood
         1. In the penumbras and existed prior to the Constitution and affects minorities
   b. Methodology

   i. Is there a fundamental right?
      (see below)

      Yes
      No = RB

   Was it infringed?
   (look at directness and substantiality of interference)

      Yes = SS
      - Undue burden for abortion (*Casey*)
      - Heightened for sexuality (*Lawrence* = says "leigimate" but maybe just b/c would also fail RB... what dissent suggests)
      No = RB

   1. Depends on how you define/frame the issue and the “liberty” involved
      a. 1st - assembly → implied right of association → right of privacy

      2. Look at (from *Griswold* Harlan concurrence):
         a. History/tradition
            i. State wants to define it narrowly/specifically and limit prior cases to their facts (*Michael H.* = state has always respected to marital family over paternity) (*Bowers* = no fundamental right to homosexual sodomy)
               1. Also good to make slippery slope arguments (*Lawrence* dissent = if you strike down sodomy laws then gay marriage, bestiality and bigamy have got to go, too)
            ii. Challenger wants to define it broadly/abstractly (*Michael H.* dissent = tradition is malleable and original reasons for a tradition may no longer apply so we have to take current society into consideration) (*Lawrence* = fundamental right to sexual privacy, overturning *Bowers*)
            iii. See standards for incorporation

   b. Basic values that underlie society
c. Judicial v. legislative competency (SOP and federalism)

c. Evolution

i. Raising children

1. Parents should be able to control the education of their children (Meyer = not ok to ban teaching foreign languages to young children) (Pierce = not ok to require kids to attend public schools)

2. EPC argument that marriage and procreation are fundamental to our existence (Skinner = not ok to forcibly sterilize criminals)

3. Fundamental right to decide family living arrangement (Moore = can’t use zoning to limit occupancy to a nuclear family—other ways to prevent overcrowding since tradition of family not limited to immediate)
   a. But can exclude most unrelated groups from a village since RB for economic legislation (Belle Terre)

4. Fundamental right for fit parent to decide who children can see (Troxel = grandparents can’t see child if fit mother says so)

5. Tradition of protecting marital family trumps paternity rights (Michael H. = presumption that child born to wife is legitimate cannot be rebutted with paternity test b/c father’s interest is not traditionally protected, narrowly defined)

ii. Having children (or not)

1. Fundamental right to marital privacy (Griswold = can’t ban use of contraceptives for married couples b/c fundamental right in penumbras of 1st, 3rd, 4th, 5th, and 9th Amendments… concurrences said just 9th or “implicit in concept of ordered liberty”)

2. Fundamental right to make own decisions in matters of childbearing (Eisenstadt = EPC violation to ban distribution of contraceptives to unmarried people) (Carey = can’t ban sale of contraceptives to minors)

3. Fundamental right to abortion even when not for life of mother, although at some point state’s interest in life become compelling enough to override it (Roe = 1st trimester no regulations, after 1st trimester ok if reasonably related to maternal health, after viable regulations/prescriptions ok as long as exceptions for maternal health/life)
   a. Regulations of medical procedures shot down (Bolton = can’t require abortions performed with approval of 2 doctors) (Akron = can’t require 1st trimester abortions be performed in a hospital)
   b. Spousal and parental consent requirements shot down (Danforth = can’t delegate authority even to spouse to prevent abortion during 1st trimester)
      i. But ok if a judicial bypass or just require parental notice (Bellotti and Ashcroft)
   c. Waiting period and reporting requirements shot down (Thornburg = can’t require reporting of women’s IDs b/c chills the freedom to have an abortion)

   Funding = only non-infringement
d. **Funding restrictions** OK, aka do not infringe so don’t even get to SS (*Maher* = ok fed $ for childbirth but not abortions) (*Harris* = *Hyde Amendment* which bars fed $ for abortions is ok) (*Rust* = ok to not provide counseling concerning abortion) (*Webster* = ok to ban state employees from performing abortions)
   i. It’s a **negative right**, not an affirmative one
   ii. Gov, can’t stop you, but doesn’t have duty to help you exercise it

4. *Casey* = **SS test for abortion is undue burden**, aka substantial obstacle in path of a woman seeking an abortion
   a. Framework (replaced *Roe*’s b/c wrong):
      i. **Pre-viability**: no government prohibition, but can regulate (persuade/inform and further maternal health/safety) if no UB
         1. Not undue burden:
            a. Informed consent
            b. 24 hour waiting period (overruled *Thornburg*?)
            c. Anonymous record-keeping
            d. Parental notice with adequate judicial bypass (greater state interest in minors)
         2. Undue burden:
            a. Spousal notice (b/c may prevent even 1 woman from getting an abortion—not just an obstacle)
      ii. **Post-viability**: government can regulate and even proscribe except for maternal health/life (*Gonzales* = ok for feds to ban D&E as long as life of mother exception, but no need for health exception since not a significant risk, although open to as applied challenges. Not undue burden b/c other types of abortion available…so still need health exception otherwise!)

   b. **Could not completely overrule Roe b/c of stare decisis**:  
      i. Not unworkable / no legal principle has changed  
      ii. People rely on it  
          1. A **one-way ratchet** so once you have it you can’t take it away? (Why *Casey* did not overrule *Roe* but *Lawrence* could overrule *Bowers*… but what about *Lochner*?)  
      iii. So would weaken SCOTUS’ legitimacy

Remember: 5th DPC for federal 

iii. Marriage

1. EPC argument against interracial marriage bans (*Loving* = DPC alternative ground b/c marriage is vital personal right essential to orderly pursuit of happiness)

2. EPC argument against child support obstacles to marriage (*Zablocki* = less restrictive means of getting child support payments, so fails SS)

3. **Fundamental right to decide to marry** (*Turner* = prisoners can marry b/c expression of public commitment, spiritual significance, often pre-condition of receipt of government benefits)
   
   a. Gay marriage? N.D. Cal says yes! (*Perry* = freedom to marry is fundamental right and P seeks recognition of this since wants the same thing as everyone else, so subject to SS. Only state interest is tradition based on morality, which isn’t enough, and domestic partnerships do not fulfill DPC obligation b/c don’t provide same meaning or benefits)

iv. Sex

1. No fundamental right to engage in homosexual sodomy (*Bowers* = framed the issue narrowly where law prohibited all sodomy but only applied to homosexuals)

2. But there is a fundamental right to decide how to conduct your private sexual life—about personal dignity and autonomy! (*Lawrence* reframed the issue more broadly to overturn *Bowers* by relying on “emerging awareness” in US and internationally, but O’Connor found EPC violation since this law was only against homosexuals, thereby upholding *Bowers*)

v. Death (or is this just a majoritarian thing that courts should stay out of, ala Scalia?)

1. **Fundamental right to refuse life saving treatment** when competent (assumed by SCOTUS, but never tested)

2. **No fundamental right to receive physician-assisted suicide** even when competent and terminally ill b/c of tradition